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Supreme Court, U.S.
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No. 96-565

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JAMES O'CONNOR,

Petitioner,

V.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Because Petitioner failed to satisfy his ultimate burden of proof on the question of pretext and age discrimination before the Court of Appeals, does the petition's challenge to the prima facie analysis present a sufficient question for review?

2. In light of the Court's previous denial of certiorari on Petitioner's challenge to alleged ageist comments, should review of this question be granted in Petitioner's second petition where the Court of Appeals' analysis has not changed?

LIST OF INTERESTED PARTIES

The parties and counsel of record are correctly identified in the caption. Consolidated Coin Caterers Corp. is a wholly-owned subsidiary of Compass Group USA, Inc.

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OPINIONS BELOW

Following remand from this Court, the Fourth Circuit Court of Appeals affirmed the trial court's grant of a Motion for Summary Judgment in favor of Consolidated Coin Caterers Corporation rejecting Petitioner's claim that he had been discriminated against on the basis of his age in violation of the Age Discrimination in Employment Act. Specifically, the Fourth Circuit held that summary judgment was appropriate because Petitioner "did not meet his ultimate burden of proving that Consolidated Coin's asserted reason was pretextual and that his age was the true reason for its challenged employment decision." (App. 5.) The appeals court's opinion is reported at 84 F.3d 718 (4th Cir. 1996) and is reproduced in the Appendix to the Petition for Certiorari. (App. 1-5.)

Petitioner moved for rehearing and suggested rehearing en banc. On July 11, 1996, the Fourth Circuit denied the petition for rehearing and declined the suggestion of rehearing en banc. The court's opinion is reproduced in the Appendix to the Petition for Certiorari. (App. 41-42.)

The District Court Opinion is reported at 829 F. Supp. 155 (W.D.N.C. 1993). (App. 29-40.) The initial Circuit Court Opinion is reported at 56 F.3d 542 (4th Cir. 1995). (App. 6-28.) The Opinion of this Court, reversing and remanding the initial Circuit Court opinion is reported at ___ U.S. ___, 116 S. Ct. 1307 (1996).

STATEMENT OF THE CASE

Petitioner's employment with Respondent ended on August 10, 1990. (App. 10.)[1] At the time of his separation, Petitioner was the manager of the Respondent's South District which consisted of only three (3) geographic territories; i.e., Charlotte, Laurinburg, and Shelby, North Carolina. On August 10, 1990, the Petitioner's position as 4C's South District Manager was eliminated as part of a two state organizational restructuring. (App. 9-10.) In August 1990, Petitioner reported to Regional Vice President, Mr. Edward (Ed) Williams, who was responsible for Canteen's operations in North Carolina, which included 4C's and Canteen's separate operations in Greensboro and Raleigh. (App. 8.) Prior to the reorganization, the following District Managers reported to Mr. Williams:

Mike Kiser 4C's NORTH District Manager Territories	Allen Hunter CANTEEN District Manager Territories	Jim O'Connor 4C's SOUTH District Manager Territories
Burlington Smithfield Tarboro	Raleigh Greensboro	Charlotte Laurinburg Shelby

[1] Citations to the Appendix of the Petition for Writ of Certiorari will hereinafter be referred to as "App.", followed by the appropriate page number(s). Portions of the deposition of Petitioner contained in the Joint Appendix of the appeal to the Fourth Circuit Court of Appeals are attached hereto as Appendix A to Respondent's Brief in Opposition.

South Boston
(Virginia)
Hickory
Asheville
Albemarle

(App. 8.) Mr. Williams reported to Mr. Ted Arts, President of Canteen's Central Division.

Prior to July 10, 1990, 4C's South had a larger territorial assignment. However, on July 10, 1990, Mr. Williams significantly reduced the size of 4C's South from six (6) geographic territories to the three (3) territories outlined above. Mr. Williams reassigned three territories from 4C's South to 4C's North which was supervised by Mike Kiser. Mr. Williams reassigned these territories because of his concerns about Petitioner's slow responses in reacting to individual problem accounts. When Mr. Williams made this earlier decision, he had no knowledge of Mr. Art's decision to consolidate the North Carolina and South Carolina organizations. (App. 9.) Petitioner did not claim age discrimination based on the July 10, 1990 territory reduction. (Respondent's App. A 1-3.)[2] Petitioner's claim of age discrimination was limited to his termination; it did not include this previous reassignment decision.

In mid to late July 1990, Mr. Arts notified Mr. Williams regarding a proposed restructuring of the Canteen

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[2] Petitioner did not claim that this reassignment was based on his age. In fact, Petitioner's deposition testimony confirmed that he only claimed that his later termination was illegally motivated, and limited his EEOC charge accordingly. (Respondent's App. A 1-3).

and 4C's operations in North and South Carolina. Mr. Arts had decided to consolidate into a single region Canteen's North and South Carolina operations and had selected Mr. Williams to manage the new consolidated two-state "Carolinas Region." (App. 9.) In addition, Mr. Arts directed Mr. Williams to combine the management responsibilities previously handled by Regional Vice President Finnell who was responsible for Canteen's South Carolina region and the three North Carolina District managers: Mr. Kiser, Mr. Hunter, and Mr. O'Connor. (App. 9.)

Thereafter, Mr. Williams decided to divide the new consolidated Region into two newly organized Districts; one covering the northern part of North Carolina and southern Virginia, which would have six geographic territories; and a second district to cover all of South Carolina and the southern portions of North Carolina, which would have nine geographic territories. (App. 9-10.)

Once the new organizational structure was established, Mr. Williams selected two managers for the new, enlarged Districts. Critical to his selection of managers was the fact that for each of these new Districts, there was to be significantly greater management responsibilities than had been required for any one of the previous districts of 4C's in North Carolina, or Canteen's South Carolina Region. (App. 10.)

Petitioner was not selected for either of the new expanded District Manager positions. Mr. Williams did not select the Petitioner because each of the new Districts had greater responsibilities; i.e., larger numbers of territories, many more accounts, and many more employees than Petitioner had previously managed in 4C's South. (App. 10-

11.) A critical element in Petitioner's non-selection was the fact that prior to Mr. Arts' decision to consolidate the North and South Carolina Regions, Mr. Williams had earlier reduced the size of the 4C's South District supervised by Petitioner, from six (6) geographic territories to only three (3) territories. Mr. Williams' decision in early July 1990 to remove three (3) territories from 4C's South and assign them to 4C's North, which was then supervised by Mike Kiser, was based on Mr. Williams' concerns about Petitioner's slow responses in reacting to individual problem accounts as the 4C's South District Manager. An additional incident considered by Mr. Williams was his discovery in July 1990 that Petitioner had failed to timely respond to a problem involving food delivery in unrefrigerated trucks. (App. 11.)

SUMMARY OF THE ARGUMENT

Petitioner claims that his petition should be granted because the Fourth Circuit violated the tenets of McDonnell Douglas Corp. v. Green. Specifically, Petitioner argues that the court below "offended this paradigm by collapsing the prima facie case stage and the employers rebuttal stage" and denied him the opportunity to demonstrate pretext. However, Petitioner's argument fails because the Fourth Circuit's analysis did not deny Plaintiff an opportunity to demonstrate pretext. Significantly, the Fourth Circuit's decision did not turn on its analysis of whether Petitioner could satisfy a prima facie case. Instead, the Fourth Circuit held that summary judgment was appropriate because Petitioner failed as to his ultimate burden; i.e., that a genuine issue of material fact existed on the issue of pretext and age discrimination. Therefore, there is simply no merit to Petitioner's argument that the analysis of the Fourth Circuit denied him an opportunity to demonstrate pretext.

Moreover, the petition should be denied because the prima facie test applied by the Fourth Circuit comported with this Court's holdings in McDonnell Douglas, Teamsters, and O'Connor. The analytical framework employed by the Fourth Circuit and its application to the record facts below required Petitioner to demonstrate facts that could create an inference of illegal age discrimination in the discharge/reorganization setting he presented to the court.

Finally, the petition should be denied because the Fourth Circuit did not ignore evidence of age differences between Petitioner and employees retained by Respondent or Petitioner's evidence of alleged ageist comments. Instead, the Court reviewed this evidence and found it insufficient to raise a genuine issue of material fact on the ultimate question

of pretext and age discrimination. Therefore, Petitioner is seeking to have this Court re-review the Fourth Circuit's application of established case precedent to the record facts because of his disagreement with the lower court's decision; however, this is not an appropriate basis to warrant the granting of a petition and it should be denied.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Affirmance Of Summary Judgment Was Based On A Review Of All Of The Evidence Introduced By Petitioner And Its Lack Of Probativeness On The Ultimate Issues Of Pretext Or Age Discrimination.

A. All Of Petitioner's Evidence Was Reviewed By The Fourth Circuit.

Petitioner claims that his petition should be granted because the Fourth Circuit violated the tenets of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), aff'd, 528 F.2d 1102 (8th Cir. 1976). Viewing this Court's guidance in McDonnell Douglas as an inflexible, mechanical minuet, Petitioner attempts to contrast the Fourth Circuit's analysis here with nine other circuit courts of appeal in arguing that the court below "offended this paradigm by collapsing the prima facie case stage and the employer's rebuttal stage." (Petition at 6.) Specifically, because the Fourth Circuit found that he could not demonstrate that he was meeting his employer's legitimate performance expectations at the time of his termination, Petitioner argues that the result was effectively to deny him the opportunity to show pretext:

> It thus allowed respondent to be heard but denied petitioner the opportunity to show that the rebuttal was pretextual . . ..

(Petition at 8.) However, the record below undermines Petitioner's argument and thus it cannot support the grant of his Petition here.

First, Petitioner's argument fails because the Fourth Circuit's analysis did not deny Petitioner any opportunity to demonstrate pretext. Significantly, the Fourth Circuit's decision did not turn on its analysis of whether Petitioner could satisfy a prima facie case. Instead, the Fourth Circuit held that summary judgment was appropriate because Petitioner failed as to his ultimate burden; i.e., that a genuine issue of material fact existed on the issues of pretext and age discrimination. As explained in the Fourth Circuit's opinion:

> Even assuming arguendo that O'Connor established a prima facie case of age discrimination, after reviewing the evidence, we conclude that he did not meet his ultimate burden of proving that Consolidated Coin's asserted reason was pretextual and that his age was the true reason for its challenged employment decision. In O'Connor I, we explained the infirmities with respect to O'Connor's direct evidence in section III.A. and his indirect evidence in section II.B. See id at 546-50. The same reasoning applies here with equal force.

O'Connor v. Consolidated Coin Caterers Corp., 84 F.3d 718, 720 (4th Cir. 1996) (App. 5)(hereinafter "O'Connor II)(emphasis added). Therefore, although all of Petitioner's evidence was considered by the Fourth Circuit, it was simply found insufficient to overcome Respondent's motion for summary judgment. Therefore, there is simply no merit to Petitioner's argument that the analysis of the Fourth Circuit denied him any opportunity to demonstrate pretext.

In opposing Defendant's motion for summary judgment, Petitioner's obligation was to introduce facts

which would demonstrate that a genuine issue of material fact existed mandating a full trial on his termination claim. Petitioner simply has not shown in his Petition, nor can he demonstrate that any evidence was ignored by the Fourth Circuit in affirming summary judgment. Thus, this Petition is not about the denial of an opportunity to fully develop his case; rather, Petitioner merely disagrees with the Fourth Circuit's application of the law to the facts of his case. This disagreement provides no basis to warrant granting the Petition. Petitioner's effort to shift the focus back to the prima facie stage should not misdirect this Court's consideration of what transpired below.[3]

As this Court long ago held: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The argument presented by Petitioner is nothing more than an attempt to create a proxy for his desire to have this Court review the Fourth Circuit's application of established case precedent to record evidence. Clearly, this is an insufficient reason to grant the Petition in this case. No direct conflict among the courts of appeal nor any conflict between this Court and a court of appeal is presented; no unsettled question of federal law is presented. Therefore, the Petition should be denied.

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[3] See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-17 (1983), aff'd, 755 F.2d 181 (D.C. Cir. 1985).

B. The Appeals Court Applied An Appropriate Prima Facie Test.

Petitioner further argues that the proper test under McDonnell Douglas is one in which a plaintiff is only required to introduce evidence of minimal qualification for his position. Under Petitioner's theory, any long service employee can satisfy a qualification requirement based on the fact he continued in the job for several years; conversely, evidence which shows deficiencies or his employer's dissatisfaction with performance at the time of a discharge decision would only be relevant for purposes of rebuttal. Petitioner relies on cases under the ADEA and Title VII involving different employment practices such as hiring, termination, and pay raises and argues that a universal ("one size fits all") test for the third prong of McDonnell Douglas in the form of minimal qualification is applicable in all situations. However, this attempt to put blinders on the eyes of federal courts is contrary to this Court's prior guidance.

Petitioner's argument does not support the grant of his Petition because the Fourth Circuit's application of McDonnell Douglas below was entirely appropriate based on the specific facts in this case. As outlined in McDonnell Douglas: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the complainant in this case] is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. Moreover, as this Court recently outlined in O'Connor:

> As the very name "prima facie case" suggests, there must be at least a logical connection between each element of the prima facie case

> and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption," Burdine, supra, at 254, n.7, 101 S.Ct., at 1094, n.7.
>
> . . .
>
> [T]he prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977)(emphasis added [in original]).

116 S. Ct. at 1310. Thus, contrary to Petitioner's desire, there is simply no universal prima facie test; instead, a prima facie case consists of a set of facts, all logically tied to the challenged decision, sufficient to raise an inference of illegal discrimination. The precise set of facts sufficient to raise such an inference is necessarily based on the particular facts presented in each case.

The analytical framework employed by the Fourth Circuit and its application to the record facts below required Petitioner to demonstrate facts that could create an inference of illegal age discrimination in the discharge/reorganization setting that he presented to the court. Petitioner's recent performance problems were properly part of the prima facie analysis because Petitioner's discharge resulted from Mr. Williams' selection of employees to handle significantly

expanded post-reorganization territories.[4] Thus, the relevant and probative evidence of qualification/performance in the present case was qualification to handle an expanded territory, not performance involved with a smaller number of territories. Thus, the Fourth Circuit's consideration of the undisputed record evidence that Petitioner's territory assignments had been reduced prior to the reorganization challenged in this litigation was proper and in full accord with this Court's holdings in O'Connor, Teamsters and McDonnell Douglas.

The focus on performance at the time of the discharge and consideration of all record evidence to determine if a prima facie case has been satisfied is not unique to the Fourth Circuit. Numerous other circuit court decisions have

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[4] As outlined by the Fourth Circuit in O'Connor I:

> In deciding to keep Finnell and Kiser and discharge O'Connor, Williams' decision was based on Finnell and Kiser's ability to handle an enlarged geographic territory; three territories were reassigned to Kiser because O'Connor was slow in responding to problem accounts; the fact that these men could handle the larger territories was critical to the decision to discharge O'Connor.

See 56 F.3d at 548.

recognized, as stated in McDonnell Douglas itself, that the elements of a prima facie case are flexible and should be tailored on a case-by-case basis to differing factual circumstances. See Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1262-64 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1372 (1994)("As an element of her prima facie case, the plaintiff was required to show that her performance on the job was adequate. She cannot satisfy this requirement by showing that her performance was adequate for some period of time during her employment . . . . The critical issue is whether she was performing well in her job at the time of her termination." (citations omitted)); Menard v. First Security Serv. Corp., 848 F.2d 281, 285-87 (1st Cir. 1988); La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1409 n.2 (7th Cir. 1984)(In ADEA discharge case, plaintiff must show satisfaction of legitimate employer expectations rather than mere qualification: "When an employee of long standing is discharged, the more appropriate concern would appear to be his job performance, into which the question of his qualifications might be seen to merge."); Agarwal v. Regents of University of Minnesota, 788 F.2d 504, 508-09 (8th Cir. 1986)(evidence that professor had retained his position for 15 years prior to termination, had been promoted to associate professor and had been recommended for promotion to full professor on four separate occasions was insufficient to make prima facie case under Title VII, in light of evidence that plagiarism incident and students' grievance led to his dismissal.); Ang v. Procter & Gamble Co., 932 F.2d 540, 548-49 (6th Cir. 1991); and Baker v. Sears, Roebuck & Co., 903 F.2d 1515, 1520-21 (11th Cir. 1990). As these cases illustrate, the precise specifications of a prima facie case outlined in McDonnell Douglas are not applicable to all situations, but can and should be modified to fit different factual scenarios.

Finally, Plaintiff's argument regarding the collapse of rebuttal into prima facie fails because it is premised on the erroneous assumption that the employer's evidence should only be considered at the rebuttal stage as the legitimate non-discriminatory reason for a challenged decision. However, as demonstrated in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993), this Court has recognized that an employer may also introduce evidence which challenges the sufficiency of the plaintiff's proffer of prima facie elements themselves.[5]

McDonnell Douglas in no way requires a trial in three distinct phases nor does it prohibit a defendant from challenging the sufficiency of a plaintiff's prima facie showing independent from its introduction of evidence explaining the reason for the challenged decision. As outlined in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic" but "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Thus, Petitioner's argument, which is premised upon a strict sequence of proof scheme, ignores this Court's already established analysis of the prima facie requirements.

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[5] As outlined in Hicks: "Thus, the effect of failing to produce evidence to rebut the McDonnell Douglas Corp. v. Green presumption is not felt until the prima facie case has been established, either as a matter of law (because the plaintiff's facts are uncontested [by the defendant]) . . .." 113 S. Ct. at 2749 n.3 (emphasis in original)(citations omitted).

II. The Court Should Not Re-Review The Fourth Circuit's Evaluation Of The Probativeness Of Any Age Difference Or Alleged Ageist Comments.

A. The Appeals Court Appropriately Considered The Age Differences.

In his second argument, Petitioner claims the petition should be granted because:

> On remand the Circuit Court made no mention whatever of the 16-year difference in age between petitioner and his replacement. This Court found the 16 year difference to be reliable evidence of age discrimination. The Circuit Court entirely ignored this evidence on remand.

(Petition at 9.) Petitioner's premise and his argument relying upon it are erroneous.

Contrary to Petitioner's view of the record, the Fourth Circuit did not ignore the age differences. Instead, the Fourth Circuit reviewed the difference in ages between Plaintiff, Finnell and Kiser in its analysis of whether Plaintiff had shown pretext:

> O'Connor contends that . . . his evidence tended to establish that Consolidated did not treat age neutrally in discharging him. To support these contentions, he relies on: . . . (2) Finnell and Kiser, the younger men, one of whom was outside the protected class, were retained while he and Hunter, the older men, were respectively discharged and demoted....

(See O'Connor I, 56 F.3d at 547, which was incorporated by reference in the Fourth Circuit's pretext analysis in O'Connor II, 84 F.3d at 720.)

The Fourth Circuit held that the retention of younger men rather than Petitioner was not probative of age discrimination since he was not comparable to either Kiser or Finnell.

> We conclude that O'Connor failed to demonstrate Consolidated did not treat age neutrally in discharging him. Focusing on retaining Finnell and Kiser, O'Connor is not comparable to Kiser or Finnell since his territory was reduced prior to his termination due to his slow response to problem accounts. Because O'Connor is not comparable to these men, comparing performance reviews and salaries is inapt. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 533 (10th Cir. 1994)(opining that in an age discrimination case, the plaintiff must be comparable to her replacement).

(See O'Connor I, 56 F.3d at 547-48 (footnote omitted), and O'Connor II, 84 F.3d at 720.) Thus, the Fourth Circuit has not ignored Petitioner's evidence or the direction of this Court. Instead, Plaintiff merely objects to the Fourth Circuit's application of existing law to the record facts, a disagreement which provides no basis for granting his Petition.

Moreover, Petitioner's argument misstates this Court's holding in O'Connor. In O'Connor, this Court held that replacement by someone outside the protected class is

not a part of a prima facie case. However, the Court did not specifically find that the 16-year age difference in the present case made out a prima facie case or was otherwise probative evidence. This Court held:

> [T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

116 S. Ct. at 1310. Thus, while this Court indicated that a substantially younger replacement could be evidence of discrimination, it in no way held the age difference in the present case was probative evidence.[6]

Thus, this Court's decision in O'Connor does not elevate the difference between O'Connor and Finnell in this case to a new status under McDonnell Douglas. Instead, the age difference is to be examined like any other evidence within the context of established case precedent. In the present case, the age difference was in fact reviewed along with Plaintiff's other evidence but found insufficient to create

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[6] There was no need to do so because the appeals court had already appropriately evaluated the age differences in O'Connor I. Moreover, this Court's holding in O'Connor in no way supports the argument that an age difference alone, even if substantial, would make out a prima facie case, or that an age difference alone would be enough to satisfy a plaintiff's burden of showing pretext.

a genuine issue of material fact on the ultimate burden of proof on pretext and age discrimination.[7]

B. Petitioner's Argument Regarding Ageist Comments Was Previously Rejected By This Court.

Finally, Petitioner belatedly claims the Fourth Circuit ignored or incorrectly analyzed his direct evidence of discrimination, alleged ageist comments. However, this argument provides no support for this Petition for several reasons. First, Petitioner sought this Court's review of this same evidence in Petitioner's first petition for writ of certiorari filed on August 29, 1995 in the form of the second question presented to the Court[8] and rejected by this Court.

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[7] The fact that no mention is made of the age difference in the Fourth Circuit's prima facie analysis is also immaterial. Because the Court found Plaintiff failed to satisfy the prima facie case's third prong - meeting his employers' expectation at the time of his termination - there was no need to mention the age difference in its prima facie analysis.

[8] As outlined in his first petition:

> Whether the Circuit Court fundamentally altered the requirements for proof of motive in holding that petitioner failed to make out a prima facie case of age discrimination based on direct and indirect evidence because (a) the decisionmaker's statement that petitioner was "too damn old for this kind of work" was not

(continued...)

(See O'Connor v. Consolidated Coin Caterers Corp., ___ U.S. ___, 116 S. Ct. 472 (1995): "The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.") The Fourth Circuit's analysis of the ageist comments did not change from O'Connor I to O'Connor II. Thus, nothing has changed to warrant review of this same evidence following O'Connor II. Thus, the Petition should be denied.

C. The Fourth Circuit's Original Analysis As To The Probativeness Of These Statements Was Correct.

Secondly, the Petition should not be granted because the Fourth Circuit's original analysis as to the probativeness of these statements was correct. In analyzing the three alleged ageist comments, the Fourth Circuit applied the following well established principals: First, "that isolated and ambiguous statements . . . 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989)(quoting Chappell v. GTE Prods. Corp., 803 F.2d 261, 268 n.2 (6th Cir.), cert. denied, 480 U.S. 919 (1987)). Second, that there must be some "nexus . . . between the alleged discriminatory statements and any of the employment decisions made by [the employer]." EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992); see also McCarthy v. Kemper Life Ins.

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[8](...continued)
made in the context of replacing petitioner and (b) other statements of age animus by the decisionmakers were not made in the context of terminating petitioner.

Cos., 924 F.2d 683, 686-87 (7th Cir. 1991)("[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge"). Figures v. Board of Pub. Utils., 967 F.2d 357, 360-61 (10th Cir. 1992)(noting that racial comments are not probative of discrimination unless they are linked to the challenged action); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990)(holding that certain statements unconnected to the employment-making process are simply stray remarks that do not demonstrate discriminatory intent).

The principles applied are consistent with Justice O'Connor's observations in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989):

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69, 106 S.Ct. 2399, 2404-07, 91 L.Ed.2d 49 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Id. at 1804-05 (emphasis added).

Applying the established principles outlined above to the three alleged comments, the court below correctly held in its first opinion that these statements were not probative of age discrimination. (App. 21-24.) First, as to the alleged statement made in regard to Don Dillingham's birthday (Respondent's App. A 4-5), there is absolutely no argument that this statement has any "nexus" with the Petitioner or the challenged employment decision. As Petitioner's own testimony clearly demonstrates, Mr. Williams' statement was made in the "context" of commenting on Mr. Dillingham's voluntary observation that it would soon be his birthday, not in the context of any employment decision, such as, to eliminate Petitioner's position. (Respondent's App. A 4-5.) Clearly, there is no nexus between this alleged statement and Mr. Williams' decision to select Mr. Kiser and Mr. Finnell to fill the two enlarged District Manager positions. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994)("Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." (citing Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1271 (8th Cir.), cert. denied, 484 U.S. 855 (1987)). See also Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1026 (6th Cir. 1993), cert. denied, 510 U.S. 861 (1993)(the comment that plaintiff's fifty-fifth birthday was a cause for concern "was too ambiguous to establish the necessary inference of age discrimination").

Similarly, the alleged comment made by Mr. Williams in reference to Petitioner's ability to play eighteen (18) holes of golf has no nexus with the challenged employment decision. (Respondent's App. A. 9-10.) A comment in reference to the Petitioner's ability to play golf can be viewed as nothing more than an isolated and ambiguous statement and therefore insufficient to support a finding of age discrimination. See Hong, 993 F.2d at 1265

(in a Title VII case, the supervisor's occasional comments that the Korean-American employee should "learn to speak English" was insufficient to show discrimination).

As to the third alleged statement, Petitioner alleges that Mr. Williams made the following remark to him two weeks prior to his termination: "O'Connor, you are too damn old for this kind of work." (Respondent's App. A 6-8.) However, as Petitioner's own testimony demonstrates, there is no nexus between the challenged decision and Mr. Williams' alleged remark:

Q What were you talking about?
A I don't remember.
Q Were you talking about some business matter?
A I don't remember.

. . .

Q Do you recall what you were talking about?
A No.

(Respondent's App. A 7-8) (emphasis added). Thus, it is clear that Petitioner has failed to show that the statement was made in any context of an employment decision, such as, replacing Petitioner. Therefore, at best, only unreasonable conjecture or speculation can attempt to connect this alleged statement with Mr. Williams' decision to select Mr. Finnell or Mr. Kiser for the new and expanded District Manager positions.

Equally significant, the alleged statement says nothing about younger employees; it does not even purport to contrast or compare Mr. O'Connor with anyone else, young or old! However, the most compelling observation is that

Mr. O'Connor has absolutely no facts about what the alleged conversation was regarding. ("Q: Were you talking about some business matter? A: I don't remember." (emphasis added).) Clearly, Petitioner's reliance on Mr. Williams' alleged statements simply is insufficient to demonstrate that Mr. Williams wanted to get rid of older workers and replace them with younger workers or that Mr. Williams considered the age of any employee in his decisions involving the two new District Manager positions.

D. Petitioner's Argument Regarding Price Waterhouse Was Not Raised Below And Therefore Is Not Properly Before This Court.

Finally, Petitioner argues the Petition should be granted because:

> The Circuits are split on whether remarks of the type presented here are sufficiently related to the decisional process to invoke the Price Waterhouse requirement that the employer prove that it would have reached the same decision absent its consideration of age.

(Petition at 10.) However, this argument also fails.

First, Price Waterhouse is not an issue in the present case because prior to a determination of the precise amount of direct evidence sufficient to shift the burden of proof from a plaintiff to a defendant, there must first be a determination that there is in fact direct evidence in the record. As outlined above, the Fourth Circuit properly held there was no direct evidence in the record; instead, the three statements identified by Plaintiff were merely stray remarks with no or

insufficient probative value. As outlined above, review of this evidence (whether the statements are direct evidence) was previously rejected by this Court. Thus, there is no basis for reviewing the issue of when the burden of proof shifts under Price Waterhouse because there is no direct evidence in the record.

Moreover, the issue of the amount of direct evidence sufficient to shift the burden of proof is not properly before this Court because it was never raised in the course of the proceedings below. It is well established that the Supreme Court does not decide questions not raised or involved in the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970)("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before us).

CONCLUSION

Consolidated Coin Caterers Corp. prays that this Court deny the petition for writ of certiorari because the case presents no issue appropriate for the Court's review, and because the lower court's analysis was not in error.

Dated this 12th day of November, 1996.

Respectfully submitted,

/s/ James B. Spears, Jr.

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APPENDIX A

ons of the Deposition
nony of James O'Connor
ined In The Joint
ndix Of The Appeal To
Fourth Circuit Court of
als.

BEST AVAILABLE COPY

MR. DALY: I don't have a signed copy either. I guess the EEOC has got the only signed copy. The one I sent you, you just signed it and mailed it on without changing it?

A. Yes.

Q. Do you want to stipulate that this was the charge?

MR. DALY: Yes. As far as I'm concerned, that's the charge.

Q. Mr. O'Connor, have you had a chance to review that last page to the EEOC charge?

A. Uh-huh (yes).

Q. Is that the charge you filed with the EEOC?

A. Yes.

Q. When you filed this, were you represented by Mr. Daly?

A. I don't remember. I believe so, but I'm not sure.

Q. Did you actually type this up yourself, or do you know who typed it?

A. I have no idea who typed it.

Q. But you read it and signed it?

A. Yes.

Q. Mr. O'Connor, just explain to me what you were complaining about in your EEOC charge. What had happened to you that you thought was discriminatory because of your age?

J.A. 116

A. Well, I originally was led to believe that my job had been eliminated, and all of a sudden, in my neighborhood, one Ted Finnell moved in and had been transferred or moved from South Carolina up to Charlotte. And I felt at that time that the job really hadn't been eliminated; that they had just brought someone in to take my place.

Q. Did Mr. Finnell take these former branches that you supervised?

A. I believe so, but I am not certain because I haven't had anything to do with the company since my termination.

Q. But aside from whatever Mr. Finnell did or didn't do, what is it you are complaining about in your EEOC charge?

A. I felt that I was discharged because of my age.

Q. Anything else?

A. No.

Q. It's your discharge you are complaining about, is that right?

A. Yes.

Q. Do you remember when you filed this charge?

A. I believe it was in December, but I'm not sure.

Q. Of what year?

A. 1990.

Q. The December after you were discharged in August?
A. Yes.
Q. Have you filed any other charges with the EEOC?
A. No.
Q. Have you filed any other charges with any other agency?
A. No.
Q. Mr. O'Connor, I guess we may be going backwards in time, but that may be the more recent way to describe your responsibilities. And you have told us your last position was district manager, food and vending, and you were responsible for three branches, Charlotte, Shelby, and Laurinburg, is that right?
A. Correct.
Q. You had that responsibility beginning in December of '89 until your termination in August of '90?
A. Yes.
Q. What I would like for you to do is move back to the position you had before that and tell me what your title was and your areas of responsibility.
A. I was regional general manager or regional vice president, because they had just changed the title, of what we called 4Cs North with an office in Burlington, North Carolina and with branches that were located in Burlington, Tarboro, Raleigh, South Boston.

A. Oh.
Q. What does that mean?
A. Just I was surprised, shocked, you know. This was nothing that was seen coming. I was taken completely by surprise.
Q. Well, what part of what he told you was your response "Oh" to?
A. That he wasn't considering offering me another position because he knew I didn't want it.
Q. Well, was that true, or did you disagree with that?
A. I don't know. I wasn't offered one, so I didn't have any choice. And the point was that I would have taken a little time to think about it.
Q. Did you ask for time to think about anything?
A. I wasn't offered a job, sir.
Q. Do you recall anything else said in that discussion?
A. Yeah. Ed said that he was sorry that I had gone through the trouble to move to Charlotte.
Q. What else was said?
A. That's all I remember.
Q. Did he say anything about your age at any time in this meeting?
A. No, not that I recall.
Q. You said he had made references to your age on several occasions. When was the last one you recall?

J.A. 121

A. Two days previously.
Q. What happened?
A. We were in the car. We were on a tour of Shelby with Don Dillingham, and Don Dillingham made mention of the fact that he was soon to be 50.
Q. That Mr. Dillingham was soon to be 50?
A. Yes, that he was soon to be 50. And Ed said, "It's about time we started to get some young blood in this company."
Q. The three of you were in the car?
A. Yes.
Q. Did anyone respond to that?
A. No, not that I remember anyway.
Q. What was your reaction to that?
A. Well, being that it had been said on numerous occasions preceding that, I didn't say anything.
Q. Did Mr. Dillingham respond to that?
A. I don't remember.
Q. Was there a pregnant pause; was there a dead silence; or did anybody laugh or giggle? Try to describe the environment to me.
A. I don't really remember.
Q. You don't remember?
A. Not to the point where I would say it under oath, no, because I'm not that sure of it.

J.A. 122

Q. Did the thought that Mr. Williams might have been kidding cross your mind?
A. No.
Q. Did it ever cross your mind?
A. No.
Q. Has it ever crossed your mind since then?
A. No.
Q. Let's stay with that one for just a minute. Did you ever talk with Mr. Dillingham privately about Mr. Williams' comments?
A. No. I didn't see him after that.
Q. Did you ever talk with anyone else about Mr. Williams' comments that he made in the car with Mr. Dillingham?
A. Not necessarily about that, but I did talk to Allison Shirk.
Q. When?
A. When she was present one day when he made the same statement.
Q. Was this a previous occasion than the one involving Mr. Dillingham?
A. Yes.
Q. How much previously as best you can?
A. Within two weeks.
Q. Is this like in July of 1990?
A. No, no, no. I said within two weeks.

J.A. 123

Q. Of what?

A. Well, it probably was. You're right. It was in July. I was thinking that it was later than that. Yeah, it probably was in July, the latter part of July, when he made that statement in front of Allison.

Q. Well, set the stage for me. Where are we? Are we in another car?

A. We're in my office.

Q. In your office at the 4Cs corporate office?

A. Complex, right. Allison Shirk's office was directly adjacent to mine, and she heard the comment because she made a remark about it. And I said to her, "Allison, just --"

Q. Well, before we get to that, why don't you re-create the comment to me.

A. "O'Connor, you're too damn old."

Q. Was this Mr. Williams in your office?

A. Yes.

Q. Anybody else present?

A. No.

Q. What were you all talking about?

A. I don't remember.

Q. Were you talking about some business matter?

A. I don't remember.

Q. But Mr. Williams came to your office?

J.A. 124

A. Yes.
Q. And tell me the conversation that you recall.
A. The part that I remember is the part where he said, "O'Connor, you're too damn old for this kind of work."
Q. What was your response to that?
A. I said, "Allison, did you hear that?" And she made a comment to Ed that he shouldn't say things like that.
Q. She was in the next office?
A. Yes.
Q. When you said, "Allison," were you, so to speak, talking through the doorway to her?
A. Yes.
Q. Was your door open?
A. Yes. So was hers.
Q. What was Ed's response to that?
A. I believe he left the office.
Q. Do you recall what you all were talking about?
A. No.
Q. How long was Ed in your office?
A. I don't know. I don't remember.
Q. Well, had he been in there 30 minutes or three minutes?
A. I don't remember how long; I don't.
Q. Was it in the morning or afternoon?
A. I believe it was in the afternoon, late afternoon.

J.A. 125

Q. Any other occasion where you recall Mr. Williams making any comments about your age?
A. He said it one other time in front of -- that I remember. He said it one other time in front of Steve Carpman.
Q. Set the stage. Where, when, and what were the circumstances?
A. I believe we were in a conference room.
Q. At the corporate offices?
A. Yes.
Q. When?
A. Probably sometime during June or July.
Q. Of 1990?
A. Of 1990.
Q. Who else was present?
A. I don't think anyone was.
Q. Well, were your present?
A. Yes.
Q. And Mr. Williams?
A. Yes.
Q. And Mr. Carpman?
A. Yes.
Q. But no one else?
A. No.
Q. Why were you all together?

J.A. 126

A. We might have been watching a golf match, a Monday playoff of -- I guess it was the U.S. Open.
Q. What did he say?
A. Same thing.
Q. Well, what is that?
A. That I was too old.
Q. Why did that come up?
A. I don't remember. Something to do with the golf, I think, playing five days, 18 holes a day. I made the comment, I think -- and I'm trying to remember, but I'm not sure -- it was the fact that I couldn't walk that many rounds of golf for five days to play 18 holes for five days.
Q. And he was responding to your comment?
A. That's correct.
Q. As best you recall, tell me what his comments were.
A. That I was too old.
Q. Too old what?
A. Just too old.
Q. Did he say anything else?
A. No.
Q. Did he say you were too old to work or too old to play golf?
A. He just said I'm too old.
Q. What was your response to that?

J.A. 127